IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellant,

v.

ROBIN PEOPLES,
Appellee.

No. 2 CA-CR 2014-0408
Filed July 30, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20142935001
The Honorable Teresa Godoy, Judge Pro Tempore

REVERSED

COUNSEL

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By Nicolette Kneup, Deputy County Attorney, Tucson
Counsel for Appellant

Steven R. Sonenberg, Interim Pima County Public Defender
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Counsel for Appellee

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Judge Howard and Judge Brammer[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 The State of Arizona appeals from the trial court's order granting appellee Robin Peoples's motion to suppress evidence. The state argues the court erred by suppressing evidence of a video recording found during a search of Peoples's cellular telephone. For the following reasons, we reverse the court's suppression order.

Factual and Procedural Background

¶2 "In reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to sustaining the trial court's ruling." *State v. Gonzalez*, 235 Ariz. 212, ¶ 2, 330 P.3d 969, 970 (App. 2014). One morning in July 2013, police and paramedics responded to D.C.'s apartment after her daughter had found D.C. nonresponsive and called 9-1-1. Peoples, who had stayed at D.C.'s apartment the previous night, also was present. When Tucson Police Department (TPD) Officer Travis Mott arrived slightly later, D.C. had been pronounced dead. Mott examined the body for signs of "foul play" but found none. He then looked for D.C.'s medicine and information regarding her primary-care physician to determine "what type of medication [she had] been prescribed," when her last doctor's appointment was, if "anything out of the ordinary [wa]s going on," and if her doctor would sign the death certificate.

¶3 In the bathroom, Mott found a cellular telephone on the back of the toilet. Believing it belonged to D.C. and it might contain information about her doctor, Mott picked up the telephone and

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[1]The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

swiped the screen to activate it. When he did so, a paused video appeared on the screen; the image showed D.C. "laying on her back with no underwear and no pants on and with her bra pushed up exposing her breasts." Mott pressed the play button and watched the video long enough to see a second person and to realize "there was sexual intercourse involved."

¶4 Meanwhile, TPD officers had learned there was an outstanding warrant for Peoples's arrest. Mott detained Peoples, who lived in the apartment next to D.C.'s apartment, and recognized him as the second person in the video. Mott advised Peoples of his *Miranda*[2] rights and questioned him about the video on the cellular telephone. Peoples admitted he had used the telephone, which belonged to him, to record himself having sex with D.C. When Mott asked Peoples "if he had sex with [D.C.] when she was dead," Peoples said: "She probably was. I thought she was breathing. I heard her snoring earlier."

¶5 A grand jury indicted Peoples for one count of necrophilia and two counts of sexual assault. Peoples filed a motion to suppress the video recording found on the cellular telephone and "all statements related thereto."[3] Relying on *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473 (2014), Peoples argued that "a warrantless search of a cell phone is not permissible absent extreme exigent circumstances." He maintained "[n]o exigency existed to justify the warrantless search of [his] cell phone" because D.C. "was already deceased." He also asserted that, "even if police had permission to search [D.C.'s] apartment . . . , they lacked authority to search [his] cell phone because [he had been] an overnight guest and thus had an expectation of privacy."

¶6 In response, the state argued "the holding in *Riley* pertains only to searches of cell phones incident to arrest" and,

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[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[3]Peoples filed the motion in a separate case that later was dismissed, but the trial court treated the motion as being filed under this case number.

because "Mott did not look at Peoples' phone as a search incident to arrest but rather acted under the objectively reasonable belief that the cell phone belonged to [D.C.], *Riley* is wholly inapplicable." The state also reasoned that, even if Peoples had been an overnight guest with an expectation of privacy in the apartment and, therefore the cellular telephone found in the apartment, "Mott acted appropriately in accordance with his role as a community caretaker responding to an emergency."

¶7 After a suppression hearing, at which both Mott and Peoples testified, the trial court granted Peoples's motion. In its in-chambers ruling, the court observed that, in *Riley*, the Supreme Court recognized "the unique nature of cell phones because of the quantity and quality of information available on them." Based on *Riley* and, apparently, Peoples's status as an overnight guest, the court found Peoples "clearly had an expectation of privacy in his cell phone." It concluded the search was not justified by any of the exceptions to the warrant requirement and thus suppressed the video. In addition, the court suppressed Peoples's statements about the video because they "were directly obtained by exploitation of the illegal search."

¶8 On the state's motion, the trial court then dismissed the case without prejudice. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4032(6).

Standard of Review

¶9 We review a trial court's decision on a motion to suppress evidence for a clear abuse of discretion. *State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001). In doing so, we defer to the court's factual findings. *State v. Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d 392, 395 (App. 2000). However, "we review de novo mixed questions of law and fact and the trial court's ultimate legal conclusion[s]." *Id.*; *see also State v. Allen*, 216 Ariz. 320, ¶ 15, 166 P.3d 111, 115 (App. 2007) ("Whether a particular expectation of privacy is recognized by society as objectively reasonable is a matter of constitutional law that we consider de novo.").

Discussion

¶10 The state argues the trial court erred by granting Peoples's motion to suppress because the officers "lawfully responded to and searched [D.C.'s] apartment" and "lawfully discovered . . . Peoples' video." The state asserts the officers entered D.C.'s apartment to provide emergency aid after it was reported that D.C. was nonresponsive and were acting as community caretakers when looking for her medical information. The state further contends suppression is not the appropriate remedy because the officers acted in "objective good faith" and there would be no "deterrent effect."

¶11 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV; *see also State v. Gilstrap*, 235 Ariz. 296, ¶ 7, 332 P.3d 43, 44 (2014). As Peoples points out, a warrantless search is presumptively unreasonable, and therefore unconstitutional, unless one of the "few specifically established and well-delineated exceptions" applies. *Katz v. United States*, 389 U.S. 347, 357 (1967); *State v. Kempton*, 166 Ariz. 392, 395-96, 803 P.2d 113, 116-17 (App. 1990). And, the state bears the burden of proving that an exception applies. *State v. Ault*, 150 Ariz. 459, 464, 724 P.2d 545, 550 (1986); *see also* Ariz. R. Crim. P. 16.2(b).

¶12 However, a person claiming a Fourth Amendment violation first must demonstrate a "legitimate expectation of privacy in the invaded place." *Rakas v. Illinois,* 439 U.S. 128, 143 (1978); *see State v. Duran*, 183 Ariz. 167, 169, 901 P.2d 1197, 1199 (App. 1995). To meet this burden, the person must show: (1) "'by his conduct, [he] has exhibited an actual (subjective) expectation of privacy' in the place that was the subject of the search" and (2) "'the individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.'"[4] *State v. Adams*, 197 Ariz. 569,

[4]This issue previously was treated as a separate standing requirement, but, after *Rakas*, it was "conceptually incorporated" into the Fourth Amendment analysis. *State v. Juarez*, 203 Ariz. 441, ¶ 16, 55 P.3d 784, 788 (App. 2002); *see also United States v. Mosley*, 454 F.3d 249, 253 n.5 (3d Cir. 2006).

¶ 17, 5 P.3d 903, 906 (App. 2000), *quoting Smith v. Maryland*, 442 U.S. 735, 740 (1979). Courts must consider the totality of the circumstances to determine whether a legitimate expectation of privacy exists. *State v. Steiger*, 134 Ariz. 268, 272, 655 P.2d 808, 812 (App. 1982); *see also United States v. Silva*, 247 F.3d 1051, 1055 (9th Cir. 2001).

¶13 Here, in granting Peoples's motion to suppress, the trial court appears to have concluded he had an expectation of privacy in D.C.'s apartment as an overnight guest and an independent expectation of privacy in the contents of his cellular telephone based on *Riley*.[5] We address each determination in turn below.

[5] Before the trial court, Peoples analogized his cellular telephone to that of a closed container and cited *United States v. Davis*, 332 F.3d 1163 (9th Cir. 2003), for the proposition that "the expectation of privacy and Fourth Amendment interest of an overnight guest extends to any closed container included within the premises." He does not reassert this argument on appeal. In any event, we find *Davis* distinguishable. There, the defendant stored his closed gym bag, which officers searched, under a bed where he had slept. 332 F.3d at 1166. Although he shared the bedroom with someone else, the court found that by placing his bag under the bed he had "'manifested an expectation that the contents would remain free from public examination.'" *Id.* at 1168, *quoting United States v. Chadwick,* 433 U.S. 1, 11 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). The court therefore concluded he had a reasonable expectation of privacy in his bag. *Id.* Peoples, by contrast, left his unlocked cellular telephone in plain sight in D.C.'s bathroom, which was "readily accessible to anyone in the apartment." *United States v. Fay*, 410 F.3d 589, 590 (9th Cir. 2005) (defendant had no expectation of privacy in open duffle bag left on shelf in laundry room); *see also State v. Fassler*, 108 Ariz. 586, 593, 503 P.2d 807, 814 (1972) (defendant had no expectation of privacy in bags left in garbage can outside house); *State v. Huerta*, 223 Ariz. 424, ¶¶ 16-17, 224 P.3d 240, 244 (App. 2010) (defendant had no expectation of privacy in duffle bag left in roadway).

The Apartment

¶14 Citing *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990), and *Minnesota v. Carter*, 525 U.S. 83, 89-90 (1998), the trial court stated summarily: "An overnight guest has an expectation of privacy in the home and has protection against warrantless searches." To the extent the court based its ruling on a finding that Peoples had an expectation of privacy in D.C.'s apartment when his cellular telephone was searched, we disagree. The court's reliance on these cases is misplaced.

¶15 In *Olson*, officers entered a home—without permission and with their weapons drawn—and arrested the defendant in connection with a robbery. 495 U.S. at 93-94. The officers knew that two women lived at the home and that the defendant, who lived elsewhere, had been staying with the women temporarily. *Id.* On appeal after the defendant's conviction, the Supreme Court concluded the defendant's "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." *Id.* at 96-97. The Court explained this conclusion "merely recognizes the everyday expectations of privacy that we all share," pointing out that we stay in others' homes for various reasons, but, in doing so, we are generally seeking privacy. *Id.* at 98-99. Consequently, the Court held the defendant was entitled to the protection of the Fourth Amendment, and the officers needed a warrant to enter the home to make the arrest. *Id.* at 100-01.

¶16 *Carter* is also factually distinguishable. In that case, the Supreme Court reiterated its holding in *Olson* and further explained: "[A]n overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." *Carter*, 525 U.S. at 90. There, the defendants were present in an apartment, which was searched, for a brief business transaction. *Id.* Based on "the purely commercial nature of the transaction . . . , the relatively short period of time on the premises, and the lack of any previous connection between [the defendants] and the householder," the Court concluded the defendants were not overnight guests but "simply permitted on the

premises" and had no legitimate expectation of privacy in the apartment. *Id.* at 91.

¶17 At the suppression hearing, Peoples testified that he had stayed the previous night at D.C.'s apartment, a fact the trial court apparently adopted. *See Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d at 395. Peoples explained that he and D.C. were "in a relationship" and that he had "frequently spen[t] time at her apartment." Unlike the defendant in *Olson*, however, Peoples's status as an overnight guest the night before "is [not] enough to show" he had a legitimate expectation of privacy in D.C.'s apartment the day after. 495 U.S. at 96-97.

¶18 An overnight guest's expectation of privacy is, by its very nature, temporary. *See id.* at 99 ("[W]hen we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend. [It is] 'a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable.'"), *quoting Katz,* 389 U.S. at 361. For example, in the analogous situation of a hotel stay, guests have a reasonable expectation of privacy in their rooms. *United States v. Kitchens*, 114 F.3d 29, 31 (4th Cir. 1997). But that expectation "is not unlimited" and ceases to exist once the "rental period has terminated." *Id.* Once the guest has "lost his right to use the room," hotel personnel can enter the room, rent it to others, and remove any belongings left behind. *United States v. Croft*, 429 F.2d 884, 887 (10th Cir. 1970).

¶19 Peoples concedes he left D.C.'s apartment, initially to direct the paramedics to her apartment and then to visit a neighbor. At the suppression hearing, the prosecutor asked Peoples, "At th[e] time [you left D.C.'s apartment to go to your neighbor's house], had anyone asked you to leave?" He responded, "No. No one asked me to leave." We thus conclude Peoples's voluntary departure from D.C.'s apartment signaled the end of his visit and any corresponding expectation of privacy.[6] *See Olson*, 495 U.S. at 99.

[6]Evidence Peoples presented suggests he left D.C.'s apartment and returned to his own apartment even before D.C.'s daughter

¶20 Peoples nevertheless argues he only "left briefly." In *Olson*, the defendant temporarily left the house in which he had been staying as a guest, but he later returned and attempted to hide from the police inside the residence. 495 U.S. at 93-94. Nothing in the record suggested the defendant's status as an overnight guest had ended before police entered the residence to arrest him. His brief departure thus did not terminate his status as an overnight guest or his corresponding expectation of privacy. *Id.* at 100.

¶21 Here, Peoples left D.C.'s apartment on his own accord, not because the officers had ordered him to leave. Nor was there then any focus on Peoples as a suspect—indeed, no evidence of a crime was discovered until long after he had departed. It also does not appear that Peoples went back inside D.C.'s apartment after visiting his neighbor. And, with the exception of his cellular telephone, Peoples apparently did not leave any other personal belongings in D.C.'s apartment that could have suggested his overnight status was to continue. *See United States v. Perez*, 700 F.2d 1232, 1236 (8th Cir. 1983) (typically, overnight guest who leaves "all of his personal effects" at host's home while stepping out will maintain status and expectation of privacy). Notably, Peoples lived next door to D.C. Consequently, many of the considerations discussed in *Olson* are not present here. *See Olson*, 495 U.S. at 99 (overnight guest seeks temporary shelter and privacy). And, as the state points out, because D.C. was dead, Peoples never again would be an overnight guest in her apartment. *See id.* (theory of overnight guest based on permission from host willing to share house and privacy).

¶22 Based on the record before us, we conclude Peoples did not sustain his burden of showing he had a legitimate expectation of

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arrived that morning. Peoples attached copies of two police reports to his motion to suppress. According to one of those reports, witnesses observed "the door open, lights on, and music playing" at Peoples's apartment approximately forty minutes before D.C.'s daughter arrived. The state marked the reports as exhibits at the suppression hearing, and Mott used his to refresh his memory, but neither report was admitted into evidence.

privacy in D.C.'s apartment. *See Rakas,* 439 U.S. at 143; *Duran*, 183 Ariz. at 169, 901 P.2d at 1199. Simply put, Peoples's status as an overnight guest the night before did not establish he had an expectation of privacy in D.C.'s apartment the following day—his status had terminated upon his voluntary departure. The trial court therefore erred in concluding Peoples had a legitimate expectation of privacy in D.C.'s apartment. *See Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d at 395.

The Cellular Telephone

¶23 Based on *Riley*, the trial court also found Peoples "clearly had an expectation of privacy in his cell phone and the warrantless search of it was per se unreasonable." However, the court has misconstrued the scope and applicability of *Riley*.

¶24 In *Riley*, the Supreme Court considered "how the search incident to arrest doctrine applies to modern cell phones," which it noted are "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." ___ U.S. at ___, 134 S. Ct. at 2484. The Court recognized, "Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at ___, 134 S. Ct. at 2489. It observed that they can be used as "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers" and have "immense storage capacity." *Id.* And, consequently, the Court explained that cellular telephones "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." *Id.* at ___, 134 S. Ct. at 2488-89. The Court concluded that "a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id.* at ___, 134 S. Ct. at 2493. But it also noted that "other case-specific exceptions may still justify a warrantless search of a particular phone." *Id.* at ___, 134 S. Ct. at 2494.

¶25 We agree *Riley* stands for the proposition that generally individuals have an expectation of privacy in the contents of their cellular telephones. But that expectation nonetheless has limits. *See United States v. Aguirre*, 839 F.2d 854, 857 (1st Cir. 1988) (even "most

intimate" items not afforded protection under Fourth Amendment "if left strewn about"). And, whether an individual has an expectation of privacy "'must be determined on a case-by-case basis.'" *United States v. Scott*, 731 F.3d 659, 664 (7th Cir. 2013), *quoting United States v. Villegas,* 495 F.3d 761, 767 (7th Cir. 2007); *see also United States v. Waller*, 426 F.3d 838, 844 (6th Cir. 2005).

¶26 The Supreme Court's holding in *Riley* was premised, in part, on the idea that people typically keep their cellular telephones in their immediate possession. *See, e.g.*, *Riley*, ___ U.S. at ___, 134 S. Ct. at 2489 ("Before cell phones, a search of a person was limited by physical realities . . . ."); *see also State v. Ontiveros-Loya*, 716 Ariz. Adv. Rep. 4, ¶¶ 13, 16 (Ct. App. June 30, 2015) (noting officers must obtain warrant before searching cellular telephone "found on the person of an arrestee," but extending *Riley* to search of telephone found in room where person arrested). Indeed, both of the defendants in *Riley* had their cellular telephones on their person when officers searched them incident to arrest. ___ U.S. at ___, 134 S. Ct. at 2480-81.

¶27 That is not the case here. Peoples left D.C.'s apartment while numerous other individuals were present, including police officers, leaving his cellular telephone behind, in the bathroom. *See United States v. Fay*, 410 F.3d 589, 590 (9th Cir. 2005) (defendant had no expectation of privacy in open duffle bag left on laundry-room shelf). Significantly, Mott believed the telephone belonged to D.C. and was looking for information about her primary-care physician. Indeed, there was nothing, at that point, to connect the telephone to Peoples. Thus, *Riley* does not support the trial court's conclusion that Peoples had a per se expectation of privacy in his cellular telephone under these circumstances. *See Wyman*, 197 Ariz. 10, ¶ 5, 3 P.3d at 395.

¶28 In sum, the trial court erred by finding Peoples had a legitimate expectation of privacy in D.C.'s apartment based on his status as an overnight guest and an independent expectation of privacy in the contents of his cellular telephone based on *Riley*. Consequently, the court abused its discretion by granting Peoples's

motion to suppress.[7] *See Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d at 612; *see also State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006) (error of law committed in reaching discretionary conclusion constitutes abuse of discretion).

Disposition

¶29 For the foregoing reasons, we reverse the trial court's suppression order.

[7]Because of our resolution of the issues discussed above, we need not address the state's arguments about the emergency-aid and community-caretaking exceptions to the warrant requirement or the good-faith exception to the exclusionary rule. We note, however, that our supreme court recently has held that "the community caretaking exception does not apply to homes." *State v. Wilson*, 237 Ariz. 296, ¶ 24, 350 P.3d 800, 805 (2015).